

**SUMMARY OF PUBLIC COMMENTS
AND
THE BOARD'S RESPONSES**

Classifications, Examinations, and Selection Regulatory Package

**45-Day Comment Period June 28, 2016 through August 22, 2016.
Public Hearing Held on August 24, 2016.**

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SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

I.

Introduction

The State Personnel Board (Board) proposes to adopt, amend, and repeal numerous regulatory sections of Title 2, Chapter 1, of the Code of Regulations (CCR), which concern classifications, examinations, and selection (the CES Regulatory Package). A public comment period on these regulations was held from June 28, 2016, through August 22, 2016. A public hearing was held on August 24, 2016. The Board received both written and oral comments. All comments were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written Comments from Lisa Brown, Acting President, Association of California State Employees with Disabilities (ACSED).

Comment 1:

ACSED finds that a number of the changes being proposed in the CES Regulatory Package will be beneficial in terms of promoting diversity and simplifying the process by which qualified individuals, including persons with disabilities, will be able to seek employment with the State. In particular, ACSED supports the adoption of section 249.7, which prohibits disclosure of the basis on which individuals qualify for a list, including those qualifying through the Limited Examination and Appointment Program (LEAP). ACSED is somewhat disappointed that the Board has not taken this opportunity to propose more significant changes to regulations that would be necessary to implement recommendations made in the report submitted in December 2015 as a result of the Joint Project with the Board, the Department of Rehabilitation (DOR) and the California Department of Human Resources (CalHR) to improve the hiring, promotion, and retention of persons with disabilities.

Response 1:

The Board appreciates and thanks ACSED for its comments and support of the benefits of the CES Regulatory Package in terms of promoting diversity and simplifying the selection process. The Board also appreciates ACSED's support of proposed section 249.7.

Regarding the Joint Project, the Board notes that recommendations specific to Board action primarily concerned the updating and improvement of LEAP. The Board has been actively engaged in reviewing and updating LEAP where appropriate. Effective in

January 2016, section 155 of the Board's regulations required that where an appointing power requests or generates any type of promotional or open employment list to fill a vacant position, CalHR shall ensure that any existing LEAP-referral list corresponding to the classification of the position to be filled will also be provided to or generated for the appointing power. Section 156 also became effective in January 2016 and required that, where a LEAP-referral list exists in accordance with section 155, a Hiring Manager's Report is created that combines the names of all persons who are eligible on the LEAP-referral list with the names of all persons who are eligible on the non-LEAP employment lists. Also effective at that time was section 157, designed to ensure non-disclosure of a candidate's eligibility during the selection process. In addition, based upon the Board's LEAP working group, the Joint Project, SB 644 (legislation effective January 2016 that adopted changes to LEAP related to persons with developmental disabilities) and SB 848 (legislation that no longer requires LEAP candidates to serve both a probationary period and a job evaluation period), the Board's Policy Unit has been coordinating with CalHR to simplify, streamline, and improve LEAP. The text of those proposed regulations will be noticed to the public in the near future.

Comment 2:

ACSED urges adoption of proposed section 171.3, which affords greater flexibility in determining whether a person has education/experience equivalent to that specified in the minimum qualifications for the class. This provision will be helpful to persons with disabilities who, because of pervasive discrimination or other factors, may have excellent academic qualifications, but lack the work experience typically expected for a job.

Response 2:

The Board appreciates and thanks ACSED for its comments and support of section 171.3. Please see III., DOJ Written Comments, Comment and Response 2 (at p. 5, *post*).

Comment 3:

Proposed section 89.2 sets forth factors to consider when minimum qualifications for a classification are developed. ACSED believes that section 89.2, subdivision (a)(5) is potentially confusing and fails to provide appropriate guidance to personnel officials. The regulation does not indicate what should happen if any adverse impact is deemed likely. While the items listed in subdivisions (2), (3), and (4) are things to be considered, those do not rise to the same level of importance as a finding that adverse impact would occur. ACSED believes the regulation should specify that the proposed qualification should be eliminated or modified, so as to avoid the adverse impact, unless the proposed qualification is the only possible way to ensure that candidates will be able to perform the essential functions of the class.

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Response 3:

Laws related to prohibited discrimination based upon a theory of adverse impact or disparate impact are rooted in Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e-2 et seq.) and the California Fair Employment and Housing Act (FEHA)(Gov. Code, § 12900 et seq.). (See e.g., *Griggs v. Duke Power Co.* (1971) 401 U.S. 424,431; *Moore v. Regents of the University of California* (2016) 248 Cal.App.4th 216, 231-232.) These laws apply to state agencies (42 U.S.C.A. § 2000e(a) & (b); Gov. Code, § 12926, subd. (d)), and, like any laws, can be amended or changed. Consequently, repeating or rephrasing another law in a regulation is generally unnecessary and duplicative. In addition, should there be amendments or changes to these laws, the regulation repeating or rephrasing these laws would then need to be updated and changed. This can result in unnecessary costs and inefficient use of time and resources.

Thus, rather than repeating or rephrasing in proposed section 89.2 federal and state law that is already applicable to state agencies, Article 1.1. General Provisions has been added to include section 85 (Obligations Under Other Federal or State Laws). The proposed text of this section makes clear that nothing in Subchapter 1.3 or Subchapter 2 of the Board's regulations shall be construed to relieve appointing powers of their obligations under any applicable federal or state laws or regulations that concern persons with disabilities, upward mobility for state employees, or equal employment opportunity for any protected class. In addition, these laws will be discussed in the personnel manual that is currently being developed by CalHR in coordination with the Board and input and suggestions from state agencies. The personnel manual will be a comprehensive manual designed for civil service HR personnel containing best practices related to such topics as recruitment, exams and selection, with references to any federal or state laws impacting state civil service.

III.

Summary of Written Comments from Charlain Swenson, Personnel Officer, Office of Human Resources, Department of Justice (DOJ).

Comment 1:

(A) DOJ believes that the calculation of part-time experience based on the average of 173.33 hours is far more complicated than the percentage calculation used previously. Also, is time worked as presented in section 171.1, subdivision (a) assuming four working weeks in a month? How would an appointing power calculate part-time using this formula? The only feasible way of doing this would be to pull a calendar for the years the experience is performed, count the weeks in that time, and then multiply it by the candidate's hours per week. Then that number would be divided by 173.33 to get the equivalent months. This change would require major process changes for state agencies. The previous method worked well and is more accurate.

(B) Regarding section 171.1, subdivision (b), DOJ asks how will candidates know that they need to list the competencies for each job and the percentage that they performed the duties? Will the analyst reviewing the application be required to know what competencies are learned from what tasks?

(C) Regarding section 171.1, subdivision (e), how will an appointing power determine if experience was already counted towards educational course of study if the candidate does not disclose this information on his or her application?

(D) Does section 171.1, subdivision (h) include counting unpaid Family and Medical Leave Act (FMLA) and/or California Family rights Act (CFRA) protected leave as applicable experience?

Response 1:

(A) To ensure a consistent and fair calculation of time, proposed section 171.1, subdivision (b) has been amended to add that an appointing power may use either 52 weeks to equal one year or 4.35 to equal the number of weeks in one month.

(B) Subdivision (b) that DOJ references has been changed to subdivision (c) to conform with other changes to the proposed regulation. To ensure greater clarity and consistency with classification specifications, subdivision (c) has been amended to delete reference to “if those hours relate to the same or substantially the same competencies” and changed to “if the experience gained in the jobs relates to the same or substantially the same requirements enumerated in the minimum qualifications.”

(C) It should be noted that section 6200 of the *Selection Manual* prohibits counting experience twice, which as noted in the policy, most commonly happens through the use of experience gained as part of the educational process. (*Selection Manual*, § 6200, Rev. July 1994, p. 6200.11.) The personnel manual being developed by CalHR will be designed for civil service HR personnel and will be a comprehensive manual containing best practices related to this topic.

(D) To avoid any confusion or conflict with the FMLA and/or CFRA, subdivision (h) of section 171.1 has been stricken.

Comment 2:

(A) As to proposed section 171.3, DOJ believes that this change will have a large impact on verifying minimum qualifications for outside patterns. It will be difficult to verify experience from outside state service.

(B) Does proposed section 171.3 apply to all classifications or only instances where the class specification indicates that substitutions can be made (the current procedure)? If the class specification outlines specific experience that should be substituted that conflicts with this section, which takes precedence?

(C) How will departments know which competencies are related to the candidate's education, if this information is not disclosed? How can it be ensured that the competencies will be consistently applied across all departments?

Response 2:

(A), (B), and (C) The Board recognizes that ACSED supports proposed section 171.3. DOJ, however, has raised issues with this proposed regulation that could result in confusion where there is a conflict between section 171.3 and the equivalencies and equivalent combinations stated in a class specification. To avoid any confusion with classification specifications, proposed section 171.3 has been deleted.

Comment 3:

(A) Section 193 appears to refer to training and experience (T&E) examinations and/or the evaluation of standard state applications, though it is unclear as to the intent of the language change.

(B) Is section 193 referring specifically to education and experience (E&E) exams?

(C) What is meant by "official applications?" STD 678 State Examination Applications or T&E forms as well?

(D) Can the appraisals made be used solely for the establishment of a list? If so, how does this satisfy the merit principle and ensure the most qualified candidates are hired? How does this link to the job analysis?

Response 3:

(A), (B), and (C) Proposed section 193 has been amended to clarify that the appraisal of education and experience of competitors taking an online examination or written examination, including an examination requiring a statement of qualifications, may be made by a formula rating approved by CalHR or designated appointing power and applied to the information and data given by the competitor. Proposed section 193 has also been amended to add that the appraisal may be made with or without an interview.

(D) Yes, examinations that use a formula rating pursuant to proposed section 193 may be used to establish an employment list. The preparation of the underlying test, whether it is a T&E exam or an E&E exam, should be linked to the job analysis to ensure that the test questions are job related. As to the scoring, CalHR "or a designated appointing power may set minimum qualifying ratings for each phase of an examination and may provide that competitors failing to achieve such ratings in any phase shall be disqualified from any further participation in the examination." (Gov. Code, § 18936.)

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Comment 4:

As to proposed section 193.2, departments currently document by what criteria candidates are scored. As the language of this regulation is somewhat ambiguous, how does this new regulation affect this current practice? Should these considerations be expressly indicated on the scoring criteria?

Response 4:

Section 193.2 is specific to exam ranking considerations. DOJ's question relates to recordkeeping requirements. (See § 26.) As noted above, the Board regulations must be read in context with other civil service laws and Board regulations. It would be unnecessarily duplicative to repeat what is already required in other sections of these regulations or in other laws in each regulation. Accordingly, where appropriate, sections of the Board regulations should be read together or understood as interrelated. As discussed above, the personnel manual being developed by CalHR will be designed for civil service HR personnel and will be a comprehensive manual containing, among other things, references to Board regulations. See also XI, SEIU Comments, Comment and Response 5 (at pp. 45, *post*).

Comment 5:

(A) Section 194, Limited Three Score Examinations (LTS Examinations), will result in a list in which all passing candidates are reachable, inevitably making the exam pass/fail. All candidates will be reachable on the list and therefore the examination will not provide any differentiation of the candidates (e.g., most qualified, least qualified, and etc.). This type of scoring greatly reduces the value of the examination process.

(B) Section 194, subdivisions (a) and (b) and the corresponding explanation do not clarify under which circumstances a LTS Examination would be used. Is the LTS Examination an option or is it intended to be standard for all exams? The regulation can be interpreted to mean that all exams are three ranks only. Standards should be outlined for the use of three limited scores, as this scoring method can be abused if not used in the proper situation.

Response 5:

(A) The regulation requires that a failing score be set. Thus, candidates who do not pass this failing score are not eligible to be hired into state service. The LTS Examination does provide for differentiation of the candidates. Proposed section 194 requires that candidates are ranked and compared. In contrast, a pass/fail open or promotional examination does not rank and compare the candidates. (See *Prof. Engineers in California Government v. State Personnel Bd.* (2001) 90 Cal.App.4th 678, 702–703.) Also, please see V., Oral and Written Comments PECG, Response 2 (at pp. 16-17, *post*).

To ensure clarity as to the competitive requirements of a LTS Examination, proposed section 194 has been amended to add that the scores of candidates in the first rank shall reflect higher scores than the candidates in the second or third rank, and the scores of candidates in the second rank shall reflect higher scores than candidates in the third rank. In addition, the regulation has been clarified to ensure that the competitive nature of a LTS Examination requires a comparison of the qualifications of the candidates with other candidates and with the qualifications of the classification that is the subject of the exam.

(B) Section 194 establishes factors to consider when determining the scoring of a LTS Examination, not the circumstances under which a LTS Examination is appropriate. Section 194, subdivision (c), however, is amended to clarify that the use of LTS Examinations is not required and is within the discretion of CalHR or designated appointing power.

Comment 6:

Regarding section 195, subdivision (c), prior to 2012 the Board had contracted with departments to provide their own chairing interview examinations training. “Are those students who did not take these classes through the SPB considered certified?”

Response 6:

The Board assumes that DOJ refers to students who took those classes. Pursuant to section 195, subdivision (c), CalHR shall determine the appropriate certification for the chairperson and any member acting as chairperson in the chairperson’s absence. Accordingly, the Board encourages DOJ and any other agency to contact CalHR with questions regarding certification.

Comment 7:

(A) Why is “structured” optional in proposed section 195.1? Can the interview be unstructured? If so, that would conflict with the information presented in the Chairing Interviews class as provided by CalHR.

(B) How will the merit process be ensured if competition language has been struck?

Response 7:

(A) Proposed section 195.1, subdivision (b) has been amended to reflect that questions shall be structured.

(B) Proposed section 86 (Appointments Shall Be Based On Merit and Fitness) has been added to this regulatory package. In addition, section 195 requires that QAP members shall be familiar with and understand the merit principle, equal employment opportunity laws, and Board rules related to examinations. Further, section 195.2 has been

amended to add that the ratings for QAP examinations shall be competitive and based upon a comparison of the qualifications of the candidates with other candidates and the qualifications of the classification that is the subject of the exam.

Comment 8:

As to proposed section 195.2, will ratings be based on competitive qualifications? If not what will they be based on?

Response 8:

Proposed section 195.2 has been amended to clarify that ratings shall be competitive and based upon a comparison of the qualifications of the candidates with other candidates and the qualifications of the classification that is the subject of the exam.

Comment 9:

(A) Proposed section 249.4, subdivision (a) states that verification is not required for reemployment, SROA, or those with mandatory reinstatement rights. This contradicts other manuals authored by CalHR, where confirming that MQs are met for SROA/Surplus candidates is required. Will those resources be updated to reflect the new regulation?

(B) Regarding proposed section 249.4, subdivision (b), if it is found that the candidate will meet the MQs within a few months of the determination (i.e., 3 months or less), is it necessary to place a withhold on their record immediately? The impact on the candidate is that he or she will not be able to take the examination again for 12 months; an automatic 12-month withhold is placed on the exam record, which could have an adverse effect on the candidate's ability to apply for vacancies during that time.

Response 9:

(A) To avoid any confusion or conflict with SROA, reference to SROA has been stricken from proposed section 249.4, subdivision (a).

(B) The intent of proposed section 249.4 is to ensure that candidates selected for appointment satisfy the minimum qualifications of the classification to which he or she will be appointed.

Comment 10:

(A) As to proposed section 249.5, is the ECOS correspondence summary page and a copy of the working certification report sufficient to meet this requirement? These documents indicate which candidates were contacted and the date the contact was initiated, but do not specifically identify the contact method. If the ECOS correspondence summary page and copy of the working certification report are not

sufficient, should the department keep a list of names identifying each candidates' associated contact method for each certification? This would have a significant impact on workload as the department often sends upwards of 500 letters for a single certification.

(B) Can the verbiage in section 249.5 be clarified to indicate the specific verbiage that could be construed as asking candidates to go inactive or waive interest? The use of the words "can be construed" is ambiguous and subject to interpretation. DOJ suggests striking this language from the section.

Response 10:

(A) Proposed section 249.5 requires, "When making employment inquiries to determine an eligible candidate's interest in a job vacancy, the appointing power shall document which candidates were contacted, how and when they were contacted, and any response." The Board will recommend that CalHR modify their processes and systems to include this additional information. Until modifications are made, this information will need to be documented by agencies through other means.

(B) The Board declines to strike the requirement of section 249.5, subdivision (b), since this standard has been in place since May 31, 1973. (See Memo to All State Agencies, Standards Governing Contact of Persons on Eligible Lists, May 31, 1973, Richard L. Camilli, Executive Officer; see also, Memo to All State Agencies, Standards Governing Contact of Persons on Eligible Lists, December 27, 1974, Charles Heldebrant, Chief, Employment Services Division.) For purposes of clarity, however, the regulation is amended to state that appointing powers shall not make requests or statements that can be construed as discouraging eligible candidates from pursuing an appointment to a position.

Comment 11:

Should proposed section 249.6 be adopted, DOJ would be required to ensure the basis of a candidate's eligibility be redacted or removed prior to copies being provided to the aforementioned parties.

Response 11:

No response necessary.

Comment 12:

(A) Regarding proposed section 249.7, assuming human resources liaisons receive their certificate of completion of training pursuant to proposed section 27, will they then be allowed disclosure of a candidate's basis of eligibility?

(B) Since proposed section 249.7, subdivision (a) specifies “human resources or personnel liaison” and proposed section 249.6, subdivision (a) does not state “human resources or personnel liaisons,” can we assume that these two sections are in conflict with each other?

Response 12:

(A) No. Section 249.7, subdivision (a) does not make this exception.

(B) While proposed section 249.6 does not specifically state “human resources or personnel liaisons,” it includes the broader phrase “any other person,” which would include a human resources or personnel liaison. For purposes of clarity, however, proposed section 249.6 is amended to include reference to “human resources or personnel liaisons.”

Comment 13:

(A) Because proposed section 250 strikes reference to a probationary period, is completion of the civil service probationary period still considered one of the phases of the selection process?

(B) Does an employee who is voluntarily demoting required to meet MQs, since CalHR’s Rule 250, FAQ, No. 10, states that appointing powers must ensure an employee seeking a voluntary demotion meets the MQs or has passed probation and achieved permanent status in the demotional classification.

Response 13:

(A) Yes. (*California State Personnel Board v. California State Employee Assn.* (2005) 36 Cal.4th 758, 767; see also, *Sheena Davis v. California Department of Corrections and Rehabilitation* (2013) SPB Dec. No. 13-01; *In the Matter of the Appeal of D.R.* (1994) SPB Dec. No. 94-29.) In addition, proposed section 86.2 (Probationary Period) has been added to this regulatory package to ensure clarity as to the role of probation in the selection process.

(B) To avoid any conflict or confusion, reference to voluntary demotions has been stricken from proposed section 250. In addition, section 250, subdivision (d) has been amended to clarify that, unless otherwise specified in subdivision (f), persons selected for appointment shall satisfy the minimum qualifications of the classification to which he or she is appointed or have previously passed probation and achieved permanent status in that same classification.

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Comment 14:

Regarding proposed section 258, if a Job Control is updated after contact letters have been sent, causing the final filing dates to differ, does the department have to notify those individuals who were previously contacted via inquiry letter?

Response 14:

Proposed section 258 only concerns time periods for replies to employment inquiries following certification of an employment list. The circumstance underpinning DOJ's question is not covered by section 258.

Comment 15:

(A) As to proposed section 265, does paid time off count toward the 1500 hour limitation?

(B) Will a tracking report be implemented to facilitate part-time and full-time temporary employees' recordkeeping (similar to the State Controller's Office Intermittent Benefit Tracking report)?

Response 15:

(A) As a technical matter, proposed section 265 has been amended to proposed section 265.1 (Counting Time for Temporary Appointments). As discussed under VIII., CAL FIRE Written Comments, Response 1 (at p. 25, *post*), proposed section 265.1 has been amended to require that the working limit on temporary appointments be counted on a daily basis with every 21 days worked counting as one month or 189 days equaling 9 months. For clarity, proposed section 265, subdivision (b) has been amended to expressly state that paid absences are counted toward the 189-day limit.

(B) DOJ's question relates to the operational implementation of proposed section 265 and thus should be directed to CalHR once a final version of these regulations is adopted.

Comment 16:

Proposed section 548.40, subdivision (c) is vague in the type of scoring for CEA exams. Will these exams default to a LTS Examination? How will departments determine the appropriate scoring method?

Response 16:

Proposed section 193.1 sets the standards for the scoring of examinations. Statutory changes as a result of the Governor's Reorganization Plan shifted the responsibility for scoring from the Board to CalHR or a designated appointing power. (See AB 1062,

Stats. 2013, Ch. 427, § 36, eff. Jan. 1, 2014.) Proposed section 193.1 reflects this change. For purposes of clarity, however, section 193.1 has been amended to add reference to CEA examinations. In addition, the proposed regulation has been amended to make clear that scores and ratings shall be based upon assessing, comparing, and ranking the qualifications and performance of candidates with other candidates and the qualifications of the classification that is the subject of the examination.

Comment 17:

As to proposed section 548.42, what stage of the exam process includes “criteria applied to the candidates” and “competitiveness of the candidates’ qualifications relative to each other?” What type of documentation can be provided to meet this requirement? This verbiage is ambiguous and subject to interpretation.

Response 17:

Proposed section 548.42 and proposed section 548.40 should be read together. Proposed section 548.40 concerns competitive examinations for CEAs. In part, that regulation requires the appointing power to promulgate the job-related evaluation criteria that will be used to assess the qualifications of each candidate for the position. Additionally, the appointing power shall assess each candidate's qualifications for the position based upon the evaluation criteria and compare and rank each candidate against all other candidates based upon this assessment. Proposed section 548.42 concerns recordkeeping requirements and provides agencies with the discretion to determine how best to document these requirements. That is, proposed section 548.42 concerns the content of information that is required to be maintained, not the type of documentation that can contain this information.

As discussed above, there is a personnel manual being prepared by CalHR. Part of the goal of the manual will be to provide state agencies with best practices related to ensuring compliance with civil service laws and rules. DOJ, as well as other state agencies, are encouraged to provide input and suggestions for the manual, including best practices related to recordkeeping requirements.

IV.

Summary of Written Comments from Darci Haesche, Human Resources Chief, Department of Health Care Services (DHCS).

Comment 1:

(A) As to proposed section 27, will this regulation apply if any portion of the job functions are performing human resources (HR) liaison duties? In some departments HR functions could be 25% to 30% of the job responsibilities.

(B) Will this training allow HR Liaisons to assist with a department's decentralized hiring process; thus, allowing access to ECOS?

Response 1:

(A) Yes, proposed section 27 will apply.

(B) Agencies are required to comply with proposed sections 249.6. (Redaction of Confidential Information on Candidate Documentation) and 249.7 (Non-Disclosure of a Candidate's Basis of Eligibility), which places some degree of limits on what employees performing HR liaison duties may have access to or know. Whether state agencies can allow HR liaisons to access ECOS while still complying with proposed section 249.6 and 249.7 is an operational question best directed to CalHR, since CalHR maintains and administers ECOS.

Comment 2:

As to proposed section 171.1, subdivision (h): Unless applicants are required to disclose leaves of absence on the State (STD. 678) application, Departments will not have this information for applicants external to their respective department.

Response 2:

Proposed section 171.1, subdivision (h) has been stricken.

Comment 3:

As to proposed section 249.3: Currently, a certification used for list appointments is ordered at the time of a job posting and is valid for 120 days following the issue date. Will the certification period also be extended to 180 days, from issue date, to mirror the 180 calendar days from re-announcing?

Response 3:

Yes.

Comment 4:

As to proposed section 249.7: Once a hiring decision has been made, the hiring division must be aware of the candidate's eligibility for appointment (transfer, list appointment, etc.) in order to complete the necessary Request for Personnel Action (RPA) appointment paperwork. This is especially true wherein a department's hiring process is decentralized. The Human Resources (HR) Office does not know an offer has been made until the RPA is submitted to HR for review and approval. Additionally, the human resources/personnel liaison completes the RPA for the hiring manager.

It may be helpful for the regulation to define the steps of the “hiring process”, and/or modify the language of the regulation to be specific to the “selection process” and perhaps clarify that once a candidate has been selected, and a tentative offer extended, the candidate’s appointment eligibility may be disclosed to the hiring authorities for formal appointment. Under no circumstance may the appointing authority retract a tentative offer to a candidate, having received the employee’s appointment eligibility, without reasonable/appropriate cause to do so (could further define potential causes, if necessary).

Response 4:

The following language has been added to proposed section 249.7, subdivision (d): “Once a candidate has been selected and a tentative offer of employment extended, the selected candidate’s appointment eligibility may be disclosed but only to those employees who are required to know the basis of eligibility in order to complete the formal appointment process.”

Comment 5:

Regarding proposed section 250.1, will certifications for list appointments be extended from 120 days to 180 days, from issue date?

Response 5:

Yes. In addition, a technical change has been made to section 250.1 which renumbers the regulation to proposed section 250.2. There are no other changes to the regulation.

V.

Summary of Oral¹ and Written Comments from Gerald James, PECG Counsel, Professional Engineers in California Government (PECG).

Comment 1:

Proposed section 171 states that in meeting the minimum qualifications there is no distinction between appropriate experience “within or outside of State service.” Within both alternate ranges and promotional patterns for PECG represented classifications, there are often different experience patterns for services provided within state service in an engineering or related classification and engineering or related experience outside of state service. There is often a difference between experience performing general engineering work and performing the engineering work of a particular specialty within a department.

These classifications and criteria have developed and been utilized for decades to ensure employees have the appropriate experience to perform the job duties in their

¹ Mr. James also testified at the Board’s public hearing held on August 24, 2016.

range or within their classification. To the extent proposed section 171, as written, would conflict with these experience requirements, which have served the state employer and appointing authorities well, it must be rewritten by deleting the words “or was within or outside of State service.” This change will ensure the existing experience requirements, which appropriately distinguish between “inside” and “outside” patterns will continue to be utilized.

Response 1:

Proposed section 171, which is found in Article 8, Examinations, not Article 2, Classifications, does not set a standard related to determining what the MQs for a particular classification should be. Thus, experience requirements that are components of the MQs are not impacted by proposed section 171. Accordingly, different experience patterns for services provided within state service in an engineering or related classification and engineering or related experience outside of state service are not impacted by proposed section 171. Rather, the proposed regulation, which in part adopts long standing Board policy into a regulation (*Selection Manual*, Rev. July 1994, § 6200), sets the standard for determining whether an applicant has the appropriate experience to satisfy the MQs of a classification. To that extent, proposed section 171 requires that consideration be given to experience gained in a part-time or full-time job, regardless of whether the job was a paid or volunteer position or was within or outside of State service. The Board declines to delete consideration of experience that was within or outside of State service, since this language promotes the establishment of broad and diverse qualified applicant pools.

Comment 2:

PECG voices a strong objection to proposed section 194, concerning LTS Examinations. This section proposes a pass/fail system that has been essentially rejected by the courts as inconsistent with the merit principle and the requirement that a competitive examination process determine merit, effectiveness, and fitness for appointment and promotion. (See *Alexander v. State Personnel Board* (2000) 80 Cal.App.4th 526 [*Alexander*].) While the Board will likely note that the competitors are placed in a rank, the fact remains that everyone who is minimally qualified will pass the examination and be eligible for appointment. Having all minimally qualified applicants reachable for appointment is not an examination at all.

PECG relies upon the following quote in *Alexander*: “We rejected the argument that the Board had discretion to appoint to a state job anyone who passed the examination.” Placing all the competitors who pass into one of three ranks and then making all of them reachable will equally ignore the fact that the examination is to be competitive and equally reads the word “competitive” out of the state constitution.

The merit principle requires an actual competition and evaluation of effectiveness and fitness for appointment or promotion. The Constitution requires that all who possess the minimum qualifications may take the examination, but some score better than others

and appointing powers work from a list where only the top three ranks are reachable for appointment. The merit principle requires more than an evaluation of minimum qualifications through a pass/fail examination. The Board has a constitutional duty to reject this proposed regulation.

Response 2:

In *Alexander*, the Third District Court of Appeal, found that a demonstration project regarding career management assignments and career supervisory assignment in the Department of General Services (DGS) violated the constitutional merit principle to the extent that ranking and comparison of candidates was not required. In particular, the constitutional flaw in the demonstration project was the provision related to the exam: (1) Results “need not be expressed in specific ratings of individuals”; and (2) DGS “is not required to distinguish between groups of individuals as to who is qualified or not qualified or as to relative level of qualification.” (80 Cal.App.4th at p. 541.) In discussing the merit principle, the appellate court defined “competitive” and found that the rule of three ranks safeguards the merit principle:

The word “competitive” denotes a rivalry, contending with others. It encompasses a comparison of relative merit. We recognize the merit principle does not require that the most qualified or best candidate be chosen. Under the rule of three ranks (Gov. Code, § 19057.1), those in the top three ranks may be considered for appointment. Thus, the rule of three ranks is designed to safeguard the merit principle by assuring that one of the better candidates, if not the best, will be chosen. (*Kidd v. State of California*, *supra*, 62 Cal.App.4th at p. 404, 72 Cal.Rptr.2d 758.) Other procedures for selecting one of the better candidates could be adopted, but such procedure must require a comparison of the candidates.

(*Id.* at pp. 542-543.)

As to the flaw with the demonstration project, the appellate court likened the exam to an ungraded test: “As we read it, the regulation requires that a test be given, but the test need not be graded. It is the process of grading the test, that is, ranking and comparing the applicants, by which merit is ascertained.” (80 Cal.App.4th at p. 543.)

In *Professional Engineers in California Government v. State Personnel Board* (2001) 90 Cal.App.4th 678 [PECG 2001], where PECG challenged the career executive assignment (CEA) program, the Third District Court of Appeal, drew the distinction between competitive exams and pass/fail exams: “[R]ankings are a necessary component of a “competitive” examination, for absent ratings the examination becomes a ‘pass-examination’ which only minimally prevents spoils to the extent it weeds out the patently unfit.” (*Id.* at p. 702.) The court also noted the purpose of the competitive exam: “Its purpose was (and is) to provide accurate information to the hiring authority about the *relative* merits of the candidates, but not unfairly (or unconstitutionally) circumscribe the appointing power’s ability to make the actual selection.” (*Ibid.*)

Proposed section 194 is intended to fully comport with the merit principle. The ranking of the candidates is required to be competitive and based upon a comparison of the qualifications of the candidates with the qualifications of the classification that is the subject of the exam. Thus, unlike a pass/fail exam, the LTS Examination ranks and compares candidate qualifications.

PECG is correct in stating that the merit principle requires more than an evaluation of minimum qualifications through a pass/fail examination. Proposed section 194, however, does not state that the content of the exam shall only evaluate minimum qualifications or that candidates shall not be compared. As discussed, candidates that pass the examination are compared and ranked. The methodology, content, and type of exam will be administered by CalHR or a designated appointing power.

For purposes of clarity, proposed section 194 is amended to add that the qualifications of the candidates shall be compared with other candidates and with the qualifications of the class that is the subject of the examination. In addition, the regulation is amended to add that the scores of candidates in the first rank shall reflect higher scores than the candidates in the second or third rank, and the scores of candidates in the second rank shall reflect higher scores than candidates in the third rank.

Comment 3:

(A) Regarding proposed section 242, there are places in the state civil service system where a promotion in place is appropriate. A Staff Services Analyst (SSA) taking on more duties or performing the same work at a higher level should become an Associate Governmental Program Analyst. A promotion in place in that context by upgrading the classification level of the position does not favor the SSA over others who would otherwise compete for a promotion.

(B) If a group of Transportation Engineers at Caltrans work in a unit, one of those employees should not be selected for a Senior Transportation Engineer position through a promotion in place to the exclusion of others who should be considered for the position. Currently, if a senior position is available in the unit, those employees, and others, are able to compete for the position. Promotion of one of the employees in the unit, even if the employee happens to be filling the position in an acting position, would undermine the competition required in the merit based civil service system.

(C) Proposed section 242, subdivision (b) appears to say that even a “true vacancy” in the unit may be filled by a promotion in place.

(D) Government Code section 18951 requires that qualified employees with “willingness and ability” be “permitted to advance according to merit and ability.” This proposed regulation would bar all but one employee from the opportunity to advance; thus, violating section 18951.

(E) Proposed section 242, subdivision (b) notes that filling a true vacancy may be subject to the provisions of CalHR's SROA program. The 2015-2018 Memorandum of Understanding between the State and PEGC (BU 9) contains provisions relating to the SROA program. PEGC requests that language be inserted recognizing an MOU may conflict, similar to language used in proposed section 249.2.

Response 4:

(A) Proposed section 242 is intended to ensure a fair, competitive, and objective policy for promotions in place by requiring, in part, that the candidate for promotion must be eligible for promotion by competing in an examination for the "to" class and placing on the employment list in one of the top three ranks. Moreover, the appointing power must document and maintain the reasons why the selected employee was chosen for the promotion in place. To emphasize, however, that promotions in place must be based upon a showing of merit and fitness, the requirement that the "employee has demonstrated satisfactory or higher job performance in his or her current position and shown the ability and willingness to succeed at the higher level classification" has been added (proposed § 242, subd. (a)(1)). Reference in the regulation to "position ratio allocation limits" has been stricken.² In addition, proposed subdivision (b) has been added:

If within the employee's unit there is more than one employee who has taken the examination for the "to" class and placed on the employment list for that examination in one of the top three ranks, all such qualifying employees in the unit shall be promoted in place to the "to" class or the appointing power shall open the opportunity for promotion to competition. The appointing power may also decide not to promote.

Proposed section 242 thus encourages promotional advancement of employees showing willingness and ability to perform efficiently the services assigned them. Through its auditing power, should the Board find that the appointing power did not comply with proposed section 242, the Board can issue corrective action, including voiding the appointment.

(B) The example concerns a situation in which there is a vacancy. Proposed section 242 does not address a situation in which the promotion fills a vacancy; rather, the position occupied by the employee to be promoted is reallocated to the "to" position. An employee who is in an acting position is not in his or her "from" position; and therefore, could not be promoted in place to the classification of the acting position, because the "from" position is not being reallocated.

(C) It should be noted that subdivision (a)(1) has been renumbered to (a)(2) and subdivision (b) has been changed to subdivision (c). Proposed section 242, subdivision (a)(2) requires that the promotion in place is an appointment to a classification to which the employee's position has been reallocated, rather than a promotion that fills a vacant

² Accordingly, proposed section 84.4, defining position ratio allocation limits, has also been stricken.

position. Accordingly, a true vacancy may not be filled by a promotion in place. Subdivision (c) states that if there is a true vacancy in the unit, filling that vacancy may be subject to SROA program.

(D) In relevant part, Government Code section 18951 states:

The board and each state agency and employee shall encourage economy and efficiency in and devotion to state service by encouraging promotional advancement of employees showing willingness and ability to perform efficiently services assigned them, and every person in state service shall be permitted to advance according to merit and ability.

Proposed section 242 encourages economy and efficiency in and devotion to state service by allowing promotional advancement through promotions in place, if certain standards related to merit and fitness are met. The proposed regulation does not bar other employees from also having promotional opportunity. The addition of subdivision (b), as discussed above, is intended to make this clear.

(E) The Board declines to add this language. The Board has the constitutional and statutory authority to enforce the civil service statutes and promulgate regulations consistent with a merit based civil service system. (Cal. Const., art. VII, § 3; Gov. Code §§ 18502, 18660 & 18701.) Additionally, proposed section 242, subdivision (c) (formerly subdivision (b)) is intended to make clear that filling a true vacancy may be subject to the provisions of CalHR's SROA program. As discussed in Paragraph (C), a true vacancy may not be filled by a promotion in place.

Comment 5:

As to proposed section 548.40, the lack of competition and violation of the merit principle described in PECG's comments to proposed section 194 [Limited Three Score Examination] applies here as well. The Board must reject this proposed regulation as it is inconsistent with the California Constitution.

Response 5:

Please see Response 2 (*ante*, at pp. 16-17). In addition, proposed section 548.40 allows, but does not require, CalHR or a designated appointing power to use a LTS Examination. The Board also notes that proposed section 193.1 [Ratings for Examinations] is amended to make clear that this regulation includes CEA examinations.³

³ As discussed in the Initial Statement of Reasons, AB 1062 amended Government Code sections 18936 (final earned ratings on examinations) and 18937 (passing marks for examinations) to transfer from the Board to CalHR or a designated appointing power the authority to determine final earned ratings on exams and passing marks for exams, as specified in those statutes. Proposed section 193.1 reflects this change of authority. Additionally, to ensure that Board regulations are consistent with this statutory change, specific ratings or passing marks set in Board regulations have been deleted.

VI.

Summary of Written Comments from Mr. Gene Castillo, Retired State Manager.

Comment 1:

There has been a trend in recent years to hire former retired employees at higher rates of pay than their civil service salaries would allow for performing the same work they did as civil servants. Though proposed section 92 states that work of Special Consultants must be of a nature that the skills and etc. are not available within existing civil service classifications this is not widely nor accurately described in hiring documents maintained by agencies. This practice skirts the statutory limitation of 960 hours that a retiree can work within a fiscal year. Add a subdivision 3 to proposed section 92 that would prohibit retired civil service employees from being hired as Special Consultants rather than as retired annuitants.

Response 1:

Proposed section 92 only addresses what standards must be met to establish special consultant classes and what type of appointment shall be made. The issue of whether former retired employees should serve as Special Consultants and their rates of pay appropriately falls within the jurisdiction of CalHR. Likewise, it is the California Public Employees' Retirement System (CalPERS), not the Board, that administers and oversees the retirement laws for former civil service employees.

Comment 2:

Proposed section 242 should prohibit the promotion in place of employees from non-supervisory/managerial positions to supervisory/managerial positions without a public posting for the promotional position or strengthen the language of the regulation to raise the documentation required of agencies to explain why an employee was selected over others within the same unit. The concern is that other state employees or applicants on applicable certified employment lists will not be given the opportunity to compete for a promotion to the supervisory/management ranks. Without such a safeguard, the equal opportunity rights of others to be considered for the higher level position will be potentially violated.

Response 2:

Proposed section 242 has been amended to add subdivision (b), the intent of which is to ensure the opportunity for competition by requiring that if there is more than one employee who qualifies for a promotion in place all such employees shall be promoted in place or the appointing power shall open the opportunity for promotion to competition. The appointing power, however, may also decide not to promote.

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Comment 3:

Proposed section 249.2, subdivision (b) refers to online job announcements shall be posted for a minimum of ten “calendar” days. Past practice has been to post for ten business days, not including state holidays. This will allow a consistent amount of time for applicants and candidates to apply for positions without adversely affecting agency operations.

Response 3:

There is a balance between providing job seekers enough time to apply for job openings and providing appointing powers the ability to fill positions in a timely and efficient manner. Technology has significantly modernized the hiring process by allowing job seekers to search for job openings on the internet or create accounts on job search websites. For instance, job seekers setting up a CalCareer Account can receive contact letters for job opportunities electronically; set up notifications for new job opportunities; upload and store their resume; easily view their eligibility status; and save and submit multiple applications electronically. Thus, the Board finds that using calendar days as the standard for the postings of job announcements on websites or other electronic means is reasonable and meets the proper balance of providing job seekers enough time to apply for job openings and providing appointing powers the ability to fill positions in a timely and efficient manner.

Comment 4:

Proposed section 249.3, subdivision (b) uses the term “grade,” which may not be clear to agencies absent a definition elsewhere in the regulations. In addition, tenure and time base should be added to the list of conditions.

Response 4:

Proposed section 249.3 has been amended to delete “grade” and “position requirements” and add references to “time base,” “tenure,” and “duties.”

Comment 5:

Proposed section 249.4 should use the term “business days” rather than “working days” for consistency.

Response 5:

The Board declines to make this change. The phrase “working days” is consistent with other Board regulations (see § 302.2) and with CalHR regulations (see § 599.785).

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Comment 6:

Proposed section 250.1, subdivision (b) should use the term “business days” rather than “working days” for consistency.

Response 6:

Please see Response 5 above.

VII.

**Summary of Written Comments from Becky Shelton, Staff Services Manager I,
California Highway Patrol (CHP).**

Comment 1:

§ 174. Applications.

The regulation that is operative through June 30, 2017, states in subsection (a), “Under no circumstances will applications for examinations in progress or testing materials for examinations be returned to applicants.” The new regulation that will become operative on July 1, 2017, states, “Under no circumstances will applications for examinations in progress or examinations be returned to applicants.” Should the new regulations include “testing materials for examinations” as well?

Response 1:

Yes. Proposed section 174 has been amended to add “testing materials for examinations.”

Comment 2:

§ 242. Promotions in Place

Subdivision (i) states, “When determining whether the employee is in one of the top three ranks, reemployment and the Department’s State Restriction of appointment (SROA) lists shall not be considered, since the promotion in place is an appointment to a classification to which the employee’s position has been reallocated, rather than an appointment to a vacant position.” Does reemployment cover all reemployments including general, departmental, and sub-divisional reemployment lists?

Response 2:

Yes. For clarity, proposed section 78.2 has been added to define reemployment list as a departmental reemployment list, subdivisional reemployment list, or general reemployment list.

Comment 3:

§ 249.4. Verification of Minimum Qualifications Prior to Appointment

(A) Minimum qualifications are established for classifications in order to identify the minimum amounts of education or competencies gained from experience or minimum levels of licensure or certification necessary to perform the essential tasks and functions of a classification. Exempting SROA, reemployment, and voluntary demotions from this requirement would result in hiring unqualified candidates into positions, then allowing them to promote into higher classifications based on the experience gained from being appointed to a classification in which they originally did not meet the minimum requirements for. With SROA candidates, they may be in a department specific classification, so their agency will identify an appropriate class the candidate will have eligibility for. Why would they be exempt from meeting the minimum qualifications or required certificates for the class if they've never served in it?

(B) If we allow a candidate to provide additional information to show that they meet minimum qualifications, this could increase the falsifications of applications in the future.

(C) Allowing 10-working days to provide additional information from a candidate could delay the hiring process.

Response 3:

(A) Proposed section 249.4, subdivision (a) has been amended to delete reference to SROA lists.

(B) This comment suggests that by informing applicants of the basis for determining that he or she does not meet the minimum qualifications applicants will fabricate their qualifications in order to remain in the hiring process. Appointing powers should verify a candidate's qualifications prior to appointment. If it is discovered that an applicant has falsified his or her qualifications, the appointing power must follow the procedures for withholding the applicant.

(C) With the advent of modern technology, whether it be online examinations or contacting qualified candidates through electronic means like email, the selection process has become faster and more competitive, particularly for appointing powers trying to make offers to qualified candidates who are being sought after by other state, local, or private employers. The intent of proposed section 249.4 is to avoid the expense and cost associated with illegal appointments and to provide a speedier resolution process, if possible, where a candidate's experience and/or education appears not to satisfy minimum qualifications. The 10-working day response time provides a reasonable balance for these policy goals.

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The regulation, however, has been amended to add a condition where a candidate fails to answer within the specified timeframe. In such a circumstance, the candidate may be considered to have abandoned the selection process. Proper notice to the candidate is also required.

Comment 4:

Proposed section 249.7 [Non-Disclosure of a Candidate's Basis of Eligibility].

This regulation states that the basis of a candidate's eligibility for appointment shall not be disclosed during the hiring process. How are departments to comply when ECOS currently shows how candidates are eligible? Will ECOS be updated to redact this information?

Response 4:

These questions relate to the operational implementation of the regulation.

Comment 5:

Voluntary demotions are essentially considered transfers. Transfers, voluntary demotions, permissive reinstatements, emergency appointments, and retired annuitant appointments all fall under an A02 transaction. If we are to treat all candidates fairly in assessing their qualifications for a position, why would a transfer into a classification have to meet the minimum qualifications, but a voluntary demotion would not?

Response 5:

Proposed section 250, subdivision (f) has been amended to strike reference to voluntary demotions.

Comment 6:

Proposed section 250.1 [Hires from Certified Employment Lists].

This regulation requires that a job offer shall be made to a candidate no later than 180 calendar days after the certification date and no later than 365 working days after the certification date for classifications requiring background checks.

Currently ECOS sets the certification expiration date at 120 days. Will ECOS be updated?

Response 6:

This question relates to the operational implementation of this regulation.

VIII.

Summary of Written Comments from Trisha D. Addison, Chief, Human Resources, California Department of Forestry and Fire Protection (CAL FIRE).

Comment 1:

Proposed section 265 [Counting Time for Temporary Appointments].

CAL FIRE utilizes several non-testing classifications in its efforts to meet the mission of the agency and the State as a whole. Most notably, the Firefighter I (FFI) classification is the entry level employee into CAL FIRE's fire suppression series. Since the FFI is a non-testing classification, a temporary appointment is the only method of appointment. The FFI class is required to work a 72-hour duty week, much like other Bargaining Unit (BU) 8 classifications. Employees in this class will work three, 24-hour days in a week. With this duty week requirement, the employees in this class are required to work 312 hours in a 28-day work period. In addition to their regularly scheduled hours, it is not uncommon for FFI employees to work in excess of an additional 200 hours of overtime each work period, for a total of over 500 hours per work period. FFI employees are typically hired in April of each year to allow for them to receive appropriate training and orientation in order to ensure maximum performance and safety. Peak fire season traditionally runs from mid-May through mid-November each year, which is approximately 6 months.

With the changes of proposed section 265, employees in the FFI class can be expected to exhaust their 1,500 hour allowance within 3 months. CAL FIRE would thus need to shift much of its focus to hiring and recruitment of FFI employees year round, which would take the focus off the primary mission of safeguarding the state and its resources.

The proposed changes may be appropriate for most non-testing or temporary appointment situations; however, for the reasons stated above, CAL FIRE respectfully requests the opportunity for further discussion regarding these proposed regulatory changes, and at the very least, an exemption from the changes.

Response 1:

A technical amendment renumbers proposed section 265 to 265.1. Proposed section 265.1 has been amended to address the situation raised by CAL FIRE. The proposed amendment requires that the working limit on temporary appointments of 9-months in 12-consecutive months be counted on a daily basis with every 21 days worked counting as one month or 189 days equaling 9 months. A partial day worked counts as one day; however, the hours worked in one day is not limited by the regulation. The temporary employee shall serve no longer than 189 days in a 12 consecutive month period, and a new 189-day working limit in a 12-consecutive month timeframe may begin in the month immediately following the month that marks the end of the previous 12-consecutive month timeframe or any subsequent month.

IX.

Summary of Oral⁴ and Written Comments from Luisa Menchaca, President, League of United Latin American Citizens, 2862 (LULAC).

Comment 1:

Proposed Section 250 [Determining Merit and Fitness During the Hiring Process].

(A) The proposed sweeping changes to section 250 delete important language relating to the “fair and equitable treatment of applicants and employees on an equal opportunity basis without regard to political affiliation, race, color, ancestry, national origin, sex, sexual orientation, religion, disability, medical condition, age, or marital status.” It is very important to us as a civil rights issue that your employment regulations do not create the impression that equal opportunity is not a mandate in the State of California and that by attempting to merely streamline the process, you silently encourage nepotism and similar practices that are not consistent with the civil service merit system. Retain the current title of section 250, which emphasizes that merit and fitness is a constitutional requirement.

(B) Reference to the California Constitution, article VI, sections 1 and 6, are deleted in the Authority note. We believe it is important to keep both references in the note.

(C) We urge adding reference to what is known as Proposition 20 (Calif. Const., art. 1, § 31). This provision provides that no discrimination and no preferential treatment are permissible in the state hiring process. Some think about this constitutional amendment only as a way to avoid hiring ethnic minorities, but we think the amendment serves to protect ethnic minorities, because in many instances hiring practices are discriminatory as implemented and preferential treatment is granted to non-minorities.

(D) The proposed regulation does not give appointing powers and agencies clear guidance regarding what skills or characteristics are to be assessed in determining “job related criteria” during the interview process. Instead, the proposed regulation leaves it to the appointing power or agency to define this on their own terms.

(E) The proposed regulation raises possibilities for abuse: (1) There is no list of characteristics agencies or appointing powers are to consider, which can lead to the creation of tests that are tailored to the exclusion of potentially eligible candidates; (2) There is a complete removal of the current 250’s objective scoring and rating criteria. The proposed language gives the agency or appointing power exclusive authority to determine “some form of rating or scoring for each candidate. Consequently, an agency may create a rating or scoring system that has a discriminatory effect on a class of protected or semi-protected persons, and applicants seeking to challenge the scoring or rating system would be without clear scoring and rating criteria that presently exists in the current regulation.

⁴ Ms. Menchaca also testified at the public hearing held on August 24, 2016.

(F) Current section 210, which is proposed to be repealed, clarifies what is to happen if two eligible candidates are tied under the scoring criteria for an appointment list. Proposed rule 250 does not set any limits to an agency's or appointing power's rating or scoring criteria. As a result, subsequent reviewing authorities would be hard-pressed to know what authority to apply in reviewing cases where a rating or scoring system did not consider the possibility of a tie.

(G) The interplay between proposed section 193 and proposed section 250 raises additional concerns. Proposed section 193 does not require that an agency or appointing power submit its formula rating to additional scrutiny, nor is there a general numerical standard to which to compare the proposed formula. Proposed section 250 places no restrictions on a formula rating prepared pursuant to proposed section 193. This means that after creating the formula, the agency or appointing power could create a rating or scoring system that heavily weighs that phase of the hiring process pursuant to the proposed language of section 250, subdivision (b). Candidates could then be summarily eliminated at the beginning of the hiring process for failing to meet the section 193 formula before their personal qualifications can be assessed. This may have discriminatory effects on protected or semi-protected persons under the guise of a facially neutral regulation.

(H) Retain the current language from section 250, subdivision (a), beginning with "shall be made on the merit and fitness" and retain the current language from section 250, subdivisions (b), (c), and (d).

Response 1:

(A) Amending proposed section 250 is necessary to update the Board's regulations. The Board's regulatory change project has been undertaken in stages, and there will be further review of these regulations and recommendations for changes where appropriate. With this particular regulatory package, it was not the intent to create the wrong impression about the importance and mandate of equal employment opportunity in state civil service.

Accordingly, to ensure clarity and avoid any confusion as to the application of merit and fitness and equal employment opportunity, this regulatory package has been amended to add Article 1.1 under which the following proposed sections have been added: 85 (Obligations Under Other Federal or State Laws), 86 (Appointments Shall Be Based on Merit and Fitness), 86.1 (Creation of Lists Shall be Based On Merit and Fitness), and 86.3 (Fair and Equitable Treatment in All Phases of the Selection Process). The intent in separating these requirements from proposed section 250 is to place emphasis on each of these obligations and requirements.

(B) The Board declines to make this change. The authority correctly relies upon the authority of the Board to promulgate this regulation, and the reference is to the applicable statutory provision the Board is empowered to implement.

(C) The Board declines to add a reference to Proposition 20. Please see Response 1(A).

(D) Proposed section 250 provides that interviews shall be conducted by using job-related measurement criteria and rating or scoring of each candidate. The measurement criteria will depend upon the job duties, functions, and level of responsibilities of the position being filled.

(E) Proposed section 250, subdivision (b) has been amended to strike reference to "some form of."

(F) The requirements of section 210 only applies to an examination in which certification from the resulting employment list is on the basis of the "three highest names." Former Government Code section 19057 provided that there shall be certified to the appointing power the names and addresses of the three persons standing highest on the promotional employment list for the class in which the position belongs. Section 19057 has been repealed (SB 99, stats. 2015, Ch. 322, § 11, eff. 9/22/15); accordingly, section 210 is appropriately stricken. Because certification is currently based upon the three highest ranks in an examination (Gov. Code § 19057.1), which allows multiple candidates to be in a single rank, replacing section 210 is unnecessary.

(G) Proposed section 86.1 is intended to ensure that the creation of lists is based on merit and fitness. In particular, proposed subdivision (a)(2) addresses the concern that LULAC raises by requiring that lists created for purposes of selecting candidates for appointment shall be based upon the merit and fitness of candidates and result from competitive exams that are fairly and objectively administered to assess, compare, and rank the qualifications and performance of candidates as related to other candidates and the classification that is the subject of the examination.

(H) Please see Response 1(A).

Comment 2:

Proposed Section 193. [Formula Rating].

Although we are concerned about the delegation of formula rating as noted above, if adopted, we recommend that the regulation provide that a merit selection manual be on file as required by section 50.

Response 2:

The Board declines to adopt this suggestion. A personnel manual is currently being developed by CalHR in coordination with the Board and input and suggestions from stakeholders. Consequently, in the near future, the Merit Selection Manual will no longer be an official HR resource for state agencies.

Comment 3:

Proposed Section 193.1 [Ratings for Examinations].

We believe this section would violate the provisions of Government Code section 18936, which does not allow for individual separate qualifying ratings and final earned ratings. Section 18936 refers to weighted phases of the examination, not individual candidate ratings. LULAC recommends that the proposed regulation be deleted.

Response 3:

The Board declines to delete proposed section 193.1, since the regulation serves to update the Board's regulations to conform to Government Code sections 18936 and 18937. In addition, this regulation serves to clarify why there were deletions in other Board regulations related to the scoring and rating of exams. To avoid any potential confusion or misinterpretation, however, proposed section 193.1 is amended to add minimum qualifying "ratings for each phase of the examination."

Comment 4:

Proposed Section 194 [Limited Three Score Examinations].

(A) LULAC is not sure the change will promote merit and fairness or revert the civil service system to a preferential treatment process whereby the regulation merely provides greater flexibility for managers to hire their friends and relatives who obtain a minimum passing score. A subsection should be added including similar language as that included in proposed section 89.2, subdivision (a)(5).

The recommendation is to add the following language:

(b)(4) Whether there is an adverse impact on persons with disabilities, upward mobility for state employees, or equal employment opportunity for any protected class.

(B) With internet testing and the large number of applicants applying for entry-level classes, LULAC believes the regulation should specify that the passing score may not be increased beyond a score of 70%. LULAC believes that the setting of this maximum passing scores should be specified to ensure scores are not artificially increased merely due to the number of applications received.

The recommendation is to add the following language:

(c) A failing score may not be set higher than 70%.

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Response 4:

(A) Please see Response 1(A) (*ante*, at p. 27).

(B) Proposed section specifies reasonable factors for CalHR or a designated appointing power to consider when determining the appropriate scores for a LTS Examination. Setting minimum qualifying ratings for each phase of an examination is within the purview of CalHR or a designated appointing power. (Gov. Code, § 18936.) Therefore, the Board declines to set a minimum passing score in the regulation.

Comment 5:

Sections 205 [Computing Examination Score] and 210 [Establishing List in Case of Tie].

LULAC believes that sections 205 and 210 provide the detail for implementation of proposed section 194 and should thus be retained to maintain fairness of the process. Accordingly, LULAC recommends that sections 205 and 210 be retained.

Response 5:

Section 205, which is based in part on former Government Code sections 18936 and 19057, provides in part specific directions as to rounding all percentage ratings to the second decimal place and the method of obtaining the average percentage of the examination. AB 1062 (stats. 2013, Ch. 427, § 36, eff. 1/1/14) amended Government Code section 18936 to transfer from the Board to CalHR or a designated appointing power the authority to determine the minimum qualifying ratings and the weights applied to the ratings in each phase of an examination. Section 210 concerns an examination in which certification from the resulting employment list is on the basis of the three highest names; this type of certification has been repealed. (See former Government Code section 19057, repealed by S.B. 99, stats. 2015, Ch. 322, § 11, eff. 9/22/15.) Accordingly, the Board declines to retain sections 205 and 210, since to do so would not conform to changes in the law.

Comment 6:

Proposed Section 242 [Promotions in Place].

(A) LULAC opposes this regulation, since LULAC understands that promotions in place are only for interchangeable classes. (See State Controller's Office Payroll Procedures Manual, per Gov. Code § 305 & the listing of interchangeable classes per Gov. Code, § 318.) The proposed language does not specify these limitations. LULAC recommends adding language that limits promotions in place to interchangeable classes.

(B) Although the regulation requires that employees to be promoted in place must compete by being placed on an employment list, the regulation does not address how preferential treatment will be avoided among several employees, especially where there

may be a history of underrepresentation by some groups. Therefore, subdivision (b) needs to include language that will discourage discrimination or preferential treatment, such as discrimination, in filling “true vacancies.” LULAC recommends adding language that would require a factor to consider in filling a true vacancy is whether there is an adverse impact on persons with disabilities, upward mobility for state employees, or equal employment opportunity for any protected class.

Response 6:

(A) The Board declines to adopt this recommendation. The Board, not the State Controller’s Office, is empowered with the authority to prescribe rules concerning promotions. (See e.g., Gov. Code, § 19050.) The conditions that proposed section 242 set on promotions in place set a standard of merit and fitness and also promote dedication and loyalty to a career in state civil service. Please also see V., PEECG Written Comments, Response 4 (*ante*, at pp. 18-19).

(B) Proposed section 242 does not allow a promotion in place to fill a true vacancy. (Proposed § 242, subds. (a)(2) & (a)(3)(i).) Additionally, subdivision (b) has been amended to address the situation where there is more than one employee who is eligible for the same promotion. The intent of subdivision (b) is to ensure fairness and equal opportunity for promotions.

Comment 7:

Proposed section 89 [Classification Plan].

LULAC supports the addition of this regulation, with some modification. Specifically, (1) add the following language to subdivision (a), “labor management agreements, reclassifications required by grievances or other remedial processes”; (2) delete “other”; (3) for subdivision (b) add the requirement that CalHR or an agency shall conduct and submit a classification study to justify the need for a new class along with the required classification proposal concept and classification considerations information and include the necessary information described at section 89.4.

Response 7:

To broaden the scope of subdivision (a), the text is amended to delete “management initiated” and thus reads “other changes.” The Board declines to require a “classification study” since such a study may not always be required when recommendations are made to change the Classification Plan, and the Board’s current process allows the Board to request further information on a class proposal, if the Board finds that such information is necessary to make an informed decision. Other technical, nonsubstantive changes are made to the regulation.

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Comment 8:

Proposed Section 89.5 [Board Approval for Changes to Class Specifications].

To streamline the classification approval process, LULAC recommends that a subdivision (b) is added to the regulation, which would allow for perfunctory changes to class specifications to be scheduled on the Board's consent calendar, such as, changes to class specifications needed to keep current with legislative action or to update names and titles.

Response 8:

The Board declines to make this amendment, since proposed section 89.5 is clear that any changes or revisions to a class specification requires Board approval. The Board does not believe that adding reference to "perfunctory changes" in this regulation will enhance the current process.

Comment 9:

§ 89.2 [Factors to Consider for Minimum Qualifications].

LULAC recommends changing the wording of subdivision (a)(5) to "any protected class."

Response 9:

For purposes of clarity, subdivision (a)(5) is amended to state "any protected class."

Comment 10:

Proposed Section 89.3 [Factors to Consider for Preferred or Desirable Qualifications].

For the same rationale stated above with respect to proposed section 89.2, LULAC recommends adding a phrase relevant to adverse impact, namely, whether requiring the level of education, experience, or other prerequisite will likely result in an adverse impact on persons with disabilities, upward mobility for state employees, or equal employment opportunity for any protected class.

Response 10:

Proposed section 85 (Obligations Under Other Federal or State Laws) is intended to ensure that nothing in Subchapter 1.3 or Subchapter 2 is construed to relieve appointing powers of their obligations under any applicable federal or state laws or regulations that concern person with disabilities, upward mobility for state employees, or equal employment opportunity for any protected class. Proposed section 89.3 falls within

Subchapter 1.3. Additionally, for purposes of clarity, proposed section 89.3 is amended to add reference to “job related.”

Comment 11:

Proposed Section 170. [Civil Service Examinations and Announcements.]

LULAC urges changes to proposed subdivision (b) to state the most important elements for applicants, including the “minimum qualifications,” and the relative weight of each aspect of the exam, even if those requirements are state in Government Code section 18933. LULAC also believes that the exam announcement should state “whether the appraisal of education and experience may be made without interview and without evaluating the personal qualifications of the competitors.”

Response 11:

The Board declines to repeat or rephrase Government Code section 18933, as the Government Code is referenced in the regulation and therefore the regulation is clear as to what standards must be followed. Also, as discussed above, the personnel manual will be designed for civil service HR personnel and will be a comprehensive manual containing best practices related to such topics as recruitment, exams, and selection, and contain references to any laws impacting civil service.

Comment 12:

§ 171 [Experience Requirements to Satisfy Minimum Qualifications].

LULAC fully supports this regulation, which provides that appropriate experience may be gained by either paid or volunteer work.

Response 12:

The Board thanks and appreciates LULAC’s support of this proposed regulation.

Comment 13:

Proposed Section 171.1 [Calculating the Amount of Time Required to Satisfy Minimum Qualifications for Experience].

(A) Proposed subdivision (d) provides that hours worked on the same job in excess of full-time (i.e., overtime hours) shall not be credited as additional time. This is a barrier that is not supported by any reasonable rationale.

(B) LULAC has reviewed various regulations relating to the counting of time for purposes of establishing minimum qualifications and has found that the detail in this regulation only appears to hurt part-timers and working class applicants, who often must

qualify on the basis of time, not education. LULAC believes that the changes would discriminate against low paid, as-needed/casual/part-time labor, who are primarily women and people of color. LULAC supports retaining subdivisions (a) and (d) without amendment.

(C) Full-time equivalents are changing at a fast pace, requiring flexibility. For example, it is not uncommon that a legislative employee's full-time equivalency is 35 hours per week, as opposed to 40 hours. A reference to the Fair Labor Standards Act may be useful.

(D) Subdivision (h) is problematic because it would tend to discriminate against women and persons with disabilities.

(E) If an employee works the prerequisite number of hours, he or she should be able to count the hours worked per week. LULAC also believes that subdivision (c) will discriminate against low paid, as-needed/casual/part-time labor, who are primarily women and people of color. A "definite and identifiable percentage" test is vague and will result in discrimination. LULAC recommends deleting subdivision (c).

(F) Subdivision (e) would discriminate against the poor, low income and foster youth high school students who use work-study to graduate from high school. In essence, the regulation means that these students will not be able to use experience gained in a work-study program to meet State minimum qualifications. This also closes the door on future State programs designed to use work study programs to pull poor low income youth and adult workers out of poverty.

Response 13:

(A) Section 171.1, subdivision (d), as it reads now, provides that overtime hours shall not be credited as additional time for purposes of determining whether an applicant satisfies the minimum qualifications of a classification. This provision has been operative since August 1990. The original rationale for creating this limitation is unclear. Certainly, overtime hours allows employees to gain additional time performing their assigned tasks and duties; thus, it is reasonable to conclude that this additional time serves to enhance and reinforce for them whatever competencies are required for those tasks and duties. Given that the instant proposed regulatory package is designed, in part, to update civil service practices to include the concept of competencies, proposed subdivision (d) is deleted.

(B) The Board declines to retain subdivisions (a) and (d) as currently written. The amendments to subdivision (a) are necessary to update the language of the regulation. Rather than retain subdivision (d), which is a general calculation that credits less than full time experience upon the percentage of time worked, subdivision (b) has been amended to ensure a consistent and fair calculation of years and months worked by adding that an appointing power may use either 52 weeks to equal one year or 4.35 to equal the number of weeks in one month.

(C) Subdivision (a) of proposed section 171.1 specifies that a full-time job is the maximum number of hours a person can spend on a job without a requirement that he or she be given overtime compensation or, where overtime is not applicable, the number of hours required for a person to receive full-time pay for the applicable work period. Reference to the Fair Labor Standards Act is unnecessary and may not take into account any relevant state laws.

(D) Subdivision (h) has been stricken.

(E) A technical change to subdivision (c) has been made which changes the subdivision to subdivision (d). The Board's *Selection Manual*, The Application Review Process, section 6200, Rev. July 1994, concerned, in relevant part, calculating the amount of time required for an applicant to satisfy minimum qualifications for experience. The policy required that an assignment must be performed for a definite and identifiable percentage of the employee's working time. (*Id.* at p. 6200.9.) Nonetheless, for purposes of clarity, subdivision (d) has been changed to state that to receive experience credit, the applicant's job responsibilities or duties "must be performed on a routine basis, either daily, weekly, monthly, or certain times of the year."

(F) Section 6200 of the *Selection Manual* prohibits counting experience twice, which as noted in the policy, most commonly happens through the use of experience gained as part of the educational process. (*Selection Manual*, § 6200, Rev. July 1994, p. 6200.11.) This regulation does not expressly prohibit students from using experience gained in a work-study program to satisfy minimum qualifications. Qualifying experience in a job while enrolled in and attending a school, college, university, or similar institution is credited for purposes of determining whether the applicant satisfies minimum qualifications except where the experience is required as part of the applicant's educational curriculum and the minimum qualifications require those courses of study and/or related academic degree.

Comment 14:

Section 265 [Temporary Authorization].

LULAC urges the retention of current section 265. Many rural areas in the State have limited names on eligible lists to hire from. In these locations, having the ability to hire a temporary authorization employee can be essential. In addition, these applicants can gain experience to qualify for entry-level positions by counting that time toward civil service employment.

Response 14:

Proposed section 265 has been amended to state that for purposes of temporary appointments, an employment list is considered not to exist where there is an open eligible list that has three or fewer names of persons willing to accept appointment and no other employment list for the classification is available. In such a situation, the

proposed regulation allows an appointing power to make a temporary appointment in accordance with section 265.1.

Comment 15:

Proposed Section 174 [Applications].

LULAC recommends the Board to retain reference to federal regulations and draft a policy memo how this section should be applied to examinations.

Response 15:

Reference to the federal regulations has been deleted, since the proposed regulation does not rely upon federal regulations for authority to promulgate the regulations nor interpret those regulations. As discussed above, the personnel manual will include references to any federal or state laws impacting civil service.

Comment 16:

Proposed Section 249.7 [Non-Disclosure of a Candidate's Basis of Eligibility].

LULAC believes there still should be reference to the LEAP program or a person with a disability in the proposed regulation.

Response 16:

Proposed section 249.7 has been amended to reference “by way of a list, transfer or LEAP.”

Comment 17:

Proposed Sections 80.3 [Qualification Appraisal Panel] and 195 [Composition of Qualifications Appraisal Panels].

(A) LULAC believes that QAPs should have two or more members. Therefore, LULAC recommends that proposed section 80.3 is amended to add “composed of two or more evaluators.”

(B) LULAC believes that current section 195 provides guidance on the conduct of interviews and is useful to ensure fairness in the process. Accordingly, LULAC recommends that current section 195 is retained.

(C) As to proposed section 195, LULAC believes the following language should be added: The qualifications Appraisal Panels in departments will be diverse and balanced to ensure that all individuals are evaluated fairly based on their qualifications.

(D) LULAC believes proposed section 195 should retain the requirement that a public member must be a member of the QAP. Community members can provide valuable input, particularly at the local level.

(E) Proposed section 195 should include language to have diverse and balanced panels. In addition, the EEO Officer should have the authority to ensure that this occurs. Government Code section 19795, subdivision (a) requires that the EEO Officer monitor the composition of oral panels for departmental examinations.

(F) If the recommended changes to proposed section 195 are not made, LULAC recommends retaining current section 196.

Response 17:

(A) Proposed section 195, Composition of Qualifications Appraisal Panels, has been amended to add that the number of members shall be no less than two.

(B) As discussed in the Initial Statement of Reasons, the QAP regulations require updating and modernization while maintaining a merit system for the civil service exam process. Proposed section 195.1 sets the appropriate standards for conducting a QAP examination. Accordingly, the Board declines to retain section 195.

(C) Proposed section 195 has been amended to state that when selecting members, consideration shall be given to selecting members who represent the diversity of the State civil service workforce.

(D) The requirement of having a community member on a QAP may have been of some value in the past; however, such a requirement today does not in and of itself improve or enhance the QAP examination and presents additional coordination and scheduling efforts. What is of strong importance in these types of exams is that panel members are properly trained and knowledgeable. Therefore, proposed section 195 requires that QAP members understand and be familiar with the class qualifications for which the examination is being held and that members are familiar with and understand the merit principle, EEO laws, and Board rules related to examinations. Accordingly, the Board declines to retain a requirement that a QAP must include a community member.

(E) Proposed section 195 has been amended to add the requirement that when selecting panel members consideration shall be given to selecting members who represent the diversity of the State civil service workforce.

(F) Amendments to proposed section 195 have been made. The Board declines to retain section 196 (Composition of Panels).

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Comment 18:

Section 198 [Competitive Ratings].

LULAC supports retaining this regulation. The new rules make no reference to a competitive rating against a rating criteria or rating standards.

Response 18:

Proposed section 193.1 has been amended to add subdivision (b), which requires that scores and ratings shall be based upon assessing, comparing, and ranking the qualifications and performance of candidates with other candidates and the qualifications of the classification that is the subject of the examination. Accordingly, the Board declines to retain section 198.

Comment 19:

§ 249.2 [Postings of Job Announcements on Websites or by Other Electronic Means].

LULAC encourages broad recruitment and outreach efforts. LULAC recommends amending the following language, as follows: “All job announcements shall be posted on the Department’s designated website and the website of relevant community-based organizations.”

Response 19:

Proposed section 249.2 has been amended to reference as examples “relevant career centers, career fairs, or academic institutions.” In addition, as discussed above, the personnel manual that CalHR is currently in the process of preparing will be a comprehensive manual designed for civil service HR personnel containing best practices related to such topics as recruitment and outreach efforts.

Comment 20:

Proposed Section 249.4 [Verification of Minimum Qualifications Prior to Appointment].

LULAC believes it is sufficient that a person sign under penalty of perjury and that the probationary process continue to be used to complete the examination cycle. If there is a reasonable basis to determine that the fraud occurred, an appointing authority has full discretion to act, but not every applicant should bear the burden of proof prior to being hired. This requirement affects working class employees more than others and students who may use more volunteer time to meet qualifications. In addition, if it is the case that many applicants are being hired who do not meet the minimum qualifications, the State needs to look at creating an examination plan that eliminates unqualified persons before they are selected.

Response 20:

Proposed section 249.4 places the burden on appointing powers to verify minimum qualifications before the appointment. Applicants are in the best position to know their experience and education, so that they can present whatever information is required by the appointing power. This is not an unreasonable or overly burdensome process for appointing powers or applicants. In addition, this proposed regulation affords candidates and appointing powers the opportunity to resolve any questions about a candidate's qualifications without the need for an appeal before the Board. The intent of this regulation is thus to avoid the costs, time, and resources that are expended where illegal appointments are found after an appointment has been made. This outcome benefits appointing powers and applicants alike. Accordingly, the Board declines to adopt LULAC's suggestion.

Comment 21:

Proposed Section 249.6 [Redaction of Confidential Information on Candidate Documentation].

LULAC recommends adding provisions that it believes would improve the proposed regulation, namely, (1) the State application be designed in such a manner that all confidential information is collected on one page that can be separated from other portions of the application; and (2) an appointing authority is not required to collect, and a candidate is not required, to provide the candidate's social security number prior to an interview.

Response 21:

The Board declines to make these amendments. CalHR and the Department of Fair Employment and Housing (DFEH) are required to work cooperatively to develop uniform employment forms where possible and in accordance with mandated employment procedures. (Gov. Code, § 18720.)

Comment 22:

Proposed Sections 548.40 through 548.70 [Career Executive Assignments].

Latinos are severely underrepresented in CEA positions. According to the latest statewide demographic report for CEAs published by CalHR as of June 30, 2016, there are 166 or 12.7% Hispanics out of a total of 1,303 CEAs. For the same time period, Hispanics made up 50,222 or 23.5% of the state workforce (50,222 out of 214,208). As of September 30, 2012, Hispanics made up 159 or 12.2% of CEAs. The total increase over almost four years is an embarrassing increase of 0.5%. LULAC would be concerned about the changes if they have an adverse impact on Latinos and other protected groups, but LULAC would need more time to evaluate the regulations. LULAC

recommends that there be an extension of time to adopt these regulations to allow greater public input.

Response 22:

For this regulatory package, there will be a 15-day written comment period for the public to comment only on the changes to the regulatory text. Proposed sections 548.40 through 548.70 have not been changed. Nonetheless, the Board will allow written comment on these regulations as well during the 15-day written comment period.

Comment 23:

Proposed section 80.1 [Employment Inquiry].

LULAC recommends adding “but not limited to.”

Response 23:

For purposes of clarity, the above language has been added to the regulation.

X.

Summary of Written Comments from Kathy Aldana, Chief, Human Resources Office, California Department of Water Resources (DWR).

Comment 1:

§ 27. Human Resources Liaison Training.

DWR agrees with this proposal; however, state agencies will require specific direction in the application of this proposed rule to ensure that it is consistently applied.

Response 1:

This comment relates to the operational implementation of the regulation.

Comment 2:

§ 82. Intra-agency Reassignment.

Changing an employee’s job assignment from one position to another position may be in conflict with not advertising positions broadly whether it is on CalCareer or internally.

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Response 2:

The Board disagrees that there is a conflict. Currently, section 250, subdivision (g) provides that “intra-departmental job assignment transfers”, i.e., an assignment transfer within the same job classification, such as assignments to different work shifts or work locations, or time base changes pursuant to section 277, do not constitute appointments for purposes of the regulation. Subdivision (g) is consistent with Government Code section 18525.3, which defines a transfer as:

(a) The appointment of an employee to another position in the same class but under another appointing power.

(b) The appointment of an employee to a different class that has substantially the same level of duties, responsibility, and salary as the employee’s current class under the same or another appointing authority.

(Emphasis added.)

An “intra-departmental job assignment transfer” under current section 250, subdivision (g) is not a “transfer” because the employee remains in the same classification under the same, not another, appointing power. To avoid any confusion with the concept of a transfer, proposed section 250 uses the term “intra-agency reassignment,” rather than “intra-departmental job assignment transfer.”

Comment 3:

§ 249.4. Verification of Minimum Qualifications Prior to Appointment.

(A) State departments will require guidance on the content of required notification to ensure that this rule is consistently applied. As the notification must also inform the candidate of their appeal rights, is it implied that non-list appointment candidates will also be afforded appeal rights, and if so, what would they be?

(B) It is unclear if this rule will apply to all candidates for a position or the selected/proposed candidate.

(C) It is unclear if the recruitment process must be delayed until the 10-working day response period has passed.

Response 3:

(A) Proposed section 249.4, subdivision (b) is amended to provide further guidance to appointing powers by adding that the notice must specify which minimum qualifications are not satisfied and the reason(s) why. As to the second part of the question, subdivision (a) of proposed section 249.4 specifies that the section applies to non-list candidates as well.

(B) It should be recognized that many factors may impact the decision of whether to MQ all candidates, a portion of candidates, or only the candidate to be appointed, such as the size of the HR staff, the size of the candidate pool, the complexity of verifying the MQs, and etc. Proposed section 249.4 does not require that all candidates or a certain portion of candidates must be MQ'd. Rather, the regulation only requires that the verification of minimum qualifications shall be made before the candidate is appointed. Therefore, it is within the appointing power's discretion to decide, based upon the circumstances, how many candidates to MQ.

(C) By reference to delaying the recruitment process until the 10-working day response period has passed, it is assumed that DWR is referring to a situation in which the prime candidate is initially determined not to meet MQs. The question is then must the appointing power delay considering other candidates for the appointment until the 10-working day response period has passed or can the appointing power consider other candidates during this time? In such a circumstance, different variables may impact the decision to wait or go forward with other candidates, such as whether the deficiency for satisfying the MQs can be easily resolved, is more problematic, will clearly not be resolved, or whether the prime candidate is unavailable for some period of the 10-working day timeframe. Proposed section 249.4 does not require an appointing power to wait nor prohibit an appointing power from considering other candidates during this time period. Therefore, the decision of whether to delay or consider other candidates is within the discretion of the appointing power and will depend upon the circumstances. When making that decision, however, the appointing power should be aware that other civil service laws and rules may apply depending upon the facts of the situation.

By implication, DWR's comment also raises the question of what occurs if a candidate fails to answer within the specified timeframe. Proposed section 249.4, subdivision (b) has been amended to include that where a candidate fails to answer within the specified timeframe, the candidate may be considered to have abandoned the selection process. Notice and an opportunity to respond are also required.

Comment 4:

§ 249.7. Non-Disclosure of a Candidate's Basis of Eligibility.

Agencies will require guidance on the acceptable language for written notice that may be used to notify candidates of their right to non-disclosure.

Response 4:

This comment relates to the operational implementation of the regulation.

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Comment 5:

§ 265. Counting Time for Temporary Appointments.

Although the intent of this section appears to alter the counting of time worked on temporary appointments from days to hours, the term “days” continues to be referenced in paragraphs (e) and (f).

Response 5:

Proposed section 265 has been renumbered to section 265.1. The amendments to proposed section 265.1, as discussed in VIII., CAL FIRE Written Comments, Response 1 (*ante*, at pp. 25), should resolve any concern with the use of the term “days.”

XI.

Summary of Written Comments from Liz Dedrick, Staff Attorney, and Anne M. Giese, Senior Staff Attorney, Service Employees International Union (SEIU).

Comment 1:

SEIU supports the general purpose of the proposed rules to the extent the changes promote transparency, clarity, fair competition, and objectivity in rules pertaining to classification, exam, and selection. The need for these types of requirements have become clear as state workers routinely experience difficulty in obtaining accurate and necessary information on the standards for examination and selection.

More importantly, the classification system lacks a meaningful way of keeping specifications current and updated. The State has fallen woefully short in updating decades old specifications that continue to retain archaic requirements and to refer to duties that state workers have not performed for years. Such shortcomings fundamentally undermine the merit principles of classification review, which the Board is constitutionally obligated to ensure.

SEIU has routinely demanded revisions to keep specifications current, but those requests have been ignored or rejected. SEIU therefore challenges the Board, as it proceeds with promulgating final regulations, to keep classification duties and requirements up-to-date, including reflecting current technology and actual job duties and to write clear regulations that impose this essential mandate. Without such a requirement, the merit principle is but a hollow shell.

Response 1:

The Board appreciates SEIU’s comments and would note that in the instant regulatory package proposed section 89 requires that all agencies shall periodically and routinely review the Classification Plan and where appropriate, make recommendations to the

Board to revise the plan to reflect new procedures, technology, or other changes significantly impacting the tasks or duties of a classification. In addition, the Board has led a classification consolidation project with CalHR that has, so far, resulted in the abolishment of 642 classifications since June 2014. In addition, effective in January 2016, section 90 became operative and created an efficient and transparent procedure to combine, alter, or abolish any class that has been vacant continuously for twenty-four months. The procedure includes a process whereby CalHR provides recommendations to the Board and interested parties are afforded an opportunity to be heard.

Comment 2:

As to proposed section 75.3, the proposed definition of the classification is inconsistent with the CalHR statutory definition found in Government Code section 19818.6, thus making the regulation vague and less clear.

Response 2:

Government Code section 19818.6 authorizes CalHR to administer the Personnel Classification Plan and concerns the parameters for determining the allocation of a position to a class. Government Code section 18800 empowers the Board to create and adjust classes of positions in civil service. The classification plan includes “a descriptive title and a definition outlining the scope of the duties and responsibilities for each class of positions.” (*Ibid.*) The regulation is thus consistent with section 18800. For purposes of clarity, however, proposed section 75.3 is amended to include reference to Government Code section 19818.6.

Comment 3:

SEIU supports the standardization of class specification format established by the Board’s proposed rule 89.4. SEIU suggests adding the following, since these two components are frequently used as determinative criteria in disputes over the appropriate allocation of particular duties and positions: (1) typical tasks performed by incumbents in a class; and (2) the level of supervision received or exercised by incumbents in the class.

Response 3:

Proposed section 89.4 has been amended to strike “examples of work” and include instead “typical tasks” and “supervision received or exercised.”

Comment 4:

Proposed section 89.6 should contain an automatic sunset of classes that are not in use for a set period of time. This would improve administrative efficiency if, for example, a class is not in use for a period of 5 years, it would be automatically removed from the Classification Plan without the need for a specific action taken by the Board.

Response 4:

The Board declines to impose an automatic sunset of classes. Government Code section 18802 requires that when abolishing classes the Board shall consider the recommendations of CalHR. Accordingly, the Board approved the implementation of section 90, which created an efficient and transparent procedure to combine, alter, or abolish any class that has been vacant continuously for twenty-four months. The procedure includes a process whereby CalHR provides recommendations to the Board and interested parties are afforded an opportunity to be heard.

Comment 5:

Proposed section 193.2 disfavors the combination of intermittent lengths of time or work seems to unnecessarily disadvantage occupations that may be seasonal in nature. Also, it may disadvantage the promotional efforts of employees from certain geographic areas of the state. For example, some applicants may have experience in performing seasonal work in Tahoe and be unfairly ranked lower than an applicant from Sacramento for no reason other than the weather in Tahoe did not allow for the work to be performed in the winter. This proposed rule is not merit-based, because it treats employees differently simply based on the demand for a continuity bonus to be applied rather than an objective evaluation of the actual time in service of those particular duties.

Response 5:

Proposed section 193.2 has been amended to strike reference to continuous length of time. The rule has also been amended and reorganized so that the factors to consider when assessing and rating a competitor's education and experience are set forth with more clarity. Those considerations are: (1) The breadth, quality, and length of time of the education and experience; (2) The relevance of the education and experience to the qualifications of the classification; and (3) The degree to which the competitor's total education and work history represent suitable preparation to successfully perform the duties and tasks of the class.

Comment 6:

(A) Regarding proposed sections 195 [Composition of Qualifications Appraisal Panels], 195.1 [QAP Interviews and Responsibilities], and 195.2 [Ratings for QAP Examinations], the Board has eliminated any uniform structure to rankings. The rating form or sheet must provide numerical grades or ranking based on the minimum qualifications as well as the preferred or desirable qualifications.

(B) There should be a minimum required score to be selected, the process for computing a total score, and the selection process in the event of a tie. The Board has gone too far with its deletions to the requirements in this area. What is left will be a

wildly varying system that is agency-specific and potentially continuously changing even within a single selection period.

(C) As to the proposed repeal of section 210, deleting the benefits of the veterans earning a tie breaker also seems unnecessary and an unfortunate reversal of otherwise good public policy.

Response 6:

(A) and (B) AB 1062 (Stats. 2013, Ch. 427, § 36, eff. Jan. 1, 2014) amended Government Code sections 18936 (final earned ratings on examinations) and 18937 (passing marks for examinations) to transfer from the Board to CalHR or a designated appointing power the authority to determine final earned ratings on exams and passing marks for exams, as specified in those statutes. Changes to the Board regulations concerning QAP examinations reflects this change of authority. Proposed section 193.1 sets the standards for rating examinations. For clarity, proposed section 193.1 is amended to include reference to CEA examinations.

(C) Section 210 is based upon former Government Code section 19057, which required that there shall be certified to the appointing power the names and addresses of the three persons standing highest on a promotional employment list. Government Code section 19057 was repealed (Sen. Bill No. 99 (2015-2016 Reg. Sess.) § 14). Accordingly, the repeal of section 210 conforms to this statutory change.

Comment 7:

Proposed section 242 on promotions in place should not allow these types of promotions to occur when they will bypass the SROA and reemployment lists for the same positions. In subdivision (b) of the regulations, employees who have SROA and reemployment rights should have access to true vacancies.

Response 7:

Proposed section 242, subdivision (a)(2) requires that the promotion in place is an appointment to a classification to which the employee's position has been reallocated, rather than a promotion that fills a vacant position. Therefore, a promotion in place may not be used to fill a true vacancy. Accordingly, proposed section 242 does not prevent or preclude eligible employees who have reemployment rights or who may be on an SROA list from filling a true vacancy, if a true vacancy exists.

Comment 8:

Regarding proposed section 250, subdivision (b), SEIU states that the wording should ensure the use of numerical rating or scoring of each candidate. Absent some numerical system to be applied, the requirement of fair competition is eroded. In ancient Rome, crowds watching gladiators would exercise "some form" of rating by using a thumbs up

to indicate that the gladiator should live or thumbs down to indicate the contrary. Thumbs up or down is clearly “some form” of rating, and thus would appear to comply with the Board’s new provision. The Board must be more precise in its requirements. Most importantly, however, a numerical ranking system is objective and verifiable rather than the vague notion of “some form” of rating.

Response 8:

Proposed section 250, subdivision (b) has been amended to strike reference to “some form of” rating or scoring of each candidate. Subdivision (b) does not require that during the hiring process interviewers use a particular rating or scoring method. In what manner the appointing power chooses to rate or score the candidate based upon job-related measurement criteria is less important than the need for the job-related measurement criteria and rating or scoring to be done. The personnel manual currently being developed by CalHR is the best place to provide examples of ways HR staff and hiring managers can develop job-related measurement criteria and methods for rating or scoring candidates during the hiring process. Numerical scoring may well be one way to rate or score candidates, but ratings by using modifiers like “Outstanding” or “Unsatisfactory” may be just as effective. Therefore, the Board declines to impose overly strict restrictions; this regulation has sufficient specificity to ensure that an objective, job-related rating or scoring criteria is used during the hiring process.

Comment 9:

Proposed section 265 does not make clear that temporary appointments may only exist in the absence of reachable candidates on an applicable list. To bury this requirement under subdivision (g) does not add to the clarity of this requirements. Moreover, the use of temporary appointments should not be to avoid or delay the requirements of SROA, reemployment, or mandatory rights of return.

Response 9:

Subdivision (g) of proposed section 265 mandates that a temporary appointment to a classification shall only be made when there is no employment list for the classification. To the extent that subdivision (g) may be misconstrued as not being clear, proposed section 265 is amended to change subdivision (g) to subdivision (a).

XII.

Summary of Written Comments from Patel Roshni, Manager, Classification & Organizational Development, CalPERS Human Resources.

Comment 1:

Proposed section 27.

Some of the concerns regarding this are: Are agencies responsible for creating and presenting training to PLs or will CalHR be doing that? If so, how do departments know what is “deemed appropriate by CalHR”?

Response 1:

These questions relate to the operational implementation of proposed section 27.

Comment 2:

Proposed section 89.

Some of the concerns regarding this are:

(A) What is their definition of “routinely” and how will departments play a role in this for state-wide used classifications?

(B) What is CalHR’s criteria for determining whether or not a new classification is necessary or unnecessary?

Response 2:

(A) The intent of proposed section 89 is to ensure that all agencies take part in ensuring that the Classification Plan is kept up-to-date and that recommendations to the Board for any changes to class specifications are timely. The term routinely should be given its ordinary meaning and thus requires agencies to review the Classification Plan on a regular, recurring basis. As a practical matter, to comply with this regulation agencies will need to develop internal policies and procedures and coordinate with each other directly or through CalHR. Coordination will be particularly important for reviewing the state-wide classifications.

(B) This question relates to CalHR’s internal process and procedures.

Comment 3:

Proposed section 242: Some of the concerns regarding this are:

(A) The language is written very vague and even with the criteria stipulated, this is going to be a huge change. Will/do departments have the choice on whether or not this implemented?

(B) Is CalHR going to be provide any written guidelines regarding this area?

(C) How will the integrity of the classification process be monitored and maintained with this regulation?

(D) What types of controls will be put into place by CalHR?

(E) Through the emails going back and forth, it appears as though some agencies are already implementing this, since it was officially approved by the Governor even though it has not been heard and approved by the Board.

Response 3:

(A) It is difficult to respond to this comment without CalPERS providing further specificity as to which language in the proposed regulation it considers to be vague. Nonetheless, in reviewing proposed section 242, the language appears sufficiently clear to provide agencies with the standards that must be met for an employee to receive a promotion in place. In addition, proposed section 242 has been amended to include subdivision (b), which sets forth the circumstances under which a promotion in place is prohibited. As to whether agencies have a choice on whether or not this regulation is implemented, the public comment periods are designed to provide all interested parties, including state agencies, the opportunity to provide comment on these proposed regulations. It should be noted that agencies are not required under proposed section 242 to promote in place employees. However, should agencies decide that a promotion in place is appropriate, proposed section 242 provides the standards that must be followed, otherwise the promotion in place is prohibited.

(B) The operational implementation of this regulation, as well as other Board regulations, falls within the purview of CalHR. (Gov. Code, § 18502.) As discussed above, CalHR is currently working on a state-wide HR manual for state agencies.

(C) The Board monitors the personnel practices of appointing powers to ensure compliance with civil service laws and Board regulations. (Gov. Code, § 18661.) Compliance with proposed section 242 will fall within the scope of these compliance reviews.

(D) Please see Response (B).

(E) The Governor does not approve Board regulations. Proposed section 242 is still in the public comment phase. Accordingly, agencies should not be acting upon proposed section 242 or any other proposed regulation until the regulation is adopted by the Board. Notice will be provided to the public and agencies when these regulations are adopted.

XIII.

Conclusion

The Board appreciates the comments and feedback it received regarding these proposed regulations. The modified text with the changes clearly indicated are available to the public as stated in the Notice of Modification to Text of Proposed Regulation.